TABLE OF CONTENTS.

The Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Summary of Argument 11

Argument 17

I. State Courts Should Accord Final Legal Significance to NLRB General Counsel Rulings on Unfair Labor Practice Charges Under the Labor-Management Relations Act 17

II. A. The Supreme Court of Wisconsin Erred in Holding That the Initial Determinations of the NLRB and Its General Counsel Were Insufficient to Invoke State Court Jurisdiction 21

B. Recognition and Organizational Picketing of Supervisors Is Neither Protected Nor Prohibited by the Act and State Courts Are Free to Regulate Such Picketing 27

C. The State Court Was Not Deprived of Jurisdiction to Regulate MEBA's Primary Recognition and Organizational Picketing of Supervisors Because the Picketing May Also Have Secondary Objectives 31

D. Petitioners Should Have Been Given the Opportunity to Prove the Scope of the NLRB Determinations. The State Court Erred by Denying a Hearing on the Merits and Speculating on the Facts 34

E. Petitioners Were Entitled to the Benefit of Every Reasonable Inference and the State Court Erred by Summarily Dismissing the Complaint 36

F. The Procedural Requirements Created to Ensure a Cohesive National Labor Policy Are Being Used to Protect Picketing Which Is Illegal Under Both Federal and State Law. This Should Be Corrected 37

Conclusion 39

Appendix. Statutes Involved 40

TABLE OF AUTHORITIES.

Cases.

Alabama Marble Co., 83 NLRB 1047 27

Anderson et al., v. Local Union No. 698, 101 Ohio Appeals 542, appeal dismissed 165 O. S. 512 29

Building Service Employers Int. Union, Local 272 v. Gazzam, 339 U. S. 532 (Washington) 29

Douds v. International Longshoremen's Association, 147 F. Supp. 103 35

Garner v. Teamsters Union, 346 U. S. 485 29

Hourihan v. National Labor Relations Board, et al., 201 F. 2d 187, certiorari denied 345 U. S. 930, rehearing denied 345 U. S. 961, 346 U. S. 843, 346 U. S. 880 and 346 U. S. 917 19

Incres Steamship Co. v. International Maritime Workers Union, 372 U. S. 24 ..... 14, 34

Interlake SS Co. v. MEBA, 108 N. W. 2d 627 (Minnesota) 28

Jackson Electric Membership Corp., 106 NLRB 1019 27

Leonard Niederriter Co., 130 NLRB 113 27

Lewis v. Labor Board, 357 U. S. 10 19

Marine Engineers Beneficial Association v. Interlake Steamship Co., 370 U. S. 173 ---------- 21, 22, 23, 24, 25, 27, 28, 36, 37, 38

Modern Cleaners Co., 100 NLRB 37 ---------- 27

Moore Dry Dock, 92 NLRB 547 ---------- 22, 32

National Licorice v. Labor Board, 309 U. S. 350 ---- 35

NLRB v. Anchor Rome Mills, Inc. (CA-5) (1956), 228 F. 2d 775 ---------- 35

NLRB v. Budd Mfg. Co., 169 F. 2d 571 (CA-6), certiorari denied, 335 U. S. 908 ---------- 27

NLRB v. Harris (CA-5) (1953), 200 F. 2d 656 ------ 35

NLRB v. Kingston Cake Co. (CA-3) (1951), 191 F. 2d 563 ---------- 35

NLRB v. Pecheur Lozenge Co., Inc. (CA-2) (1953), 209 F. 2d 393 ---------- 35

NLRB v. Swift & Co., 233 F. 2d 226 ---------- 19

NLRB v. Westex Boot & Shoe Co. (CA-5) (1951), 190 F. 2d 12 ---------- 35

Pappas v. Stacey, 151 Maine 36, appeal dismissed 350 U. S. 870 ---------- 28-29

Retail Clerks et al. v. Schermerhorn, 373 U. S. 746 -- 36

San Diego Building Trades Council v. Garmon, 359 U. S. 236 - 2, 19, 21, 22, 23, 24, 30, 31, 33, 36, 38

Vogt, Inc. v. International Brotherhood, 270 Wis. 315, affirmed 354 U. S. 284 ---------- 23

Weber v. Anheuser Busch, Inc., 348 U. S. 468 ------ 29

Statutes and Regulations.

Labor Management Relations Act, as amended, 29 U. S. C. A. 141, *et seq.* ---------- 2, 3

Sec. 2(3) (29 U. S. C. A. 152(3)) - 3, 12, 27, 29, 40

Sec. 3(d) (29 U. S. C. A. 153(d)) - 3, 17, 18, 25, 40

Sec. 7 (29 U. S. C. A. 157) ------ 3, 24, 27, 26, 41

Sec. 8(b)(4) (29 U. S. C. A. 158(b)(4)) ------ 3, 7, 14, 22, 24, 25, 26, 32, 33, 35, 37, 41-42

Sec. 8(b)(7) (29 U. S. C. A. 158(b)(7)) ----- 3, 7, 8, 11, 12, 13, 20, 22, 24, 26, 28, 30, 41, 43

Sec. 10(b) (29 U. S. C. A. 160 b)) ---------- 25

Sec. 14(a) (29 U. S. C. A. 164(a)) ---------- ---------- 3, 12, 27, 29, 45

28 U. S. C. A. 1257 ---------- 2

29 C. F. R. Part 101, Sec. 101.6 ---------- 18

29 C. F. R. Part 102, Sec. 102.19 ---------- 18, 45

Miscellaneous.

House Report 510, June 3, 1947, on the Labor-Management Relations Act, 1947, U. S. Code Congressional Service, 80th Congress, First Session, 1947, page 1143 ---------- 18

S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LRMA (1947) 411 ---------- 27

Senate Report, U. S. Code Congressional and Administrative News, 1959, Volume 2, page 2381 ------ 28

Summer, Professor Clyde W., Yale Law School, 54 Labor Relations Reporter 11 (1963) ---------- 30

2 *Wisconsin Pleading and Practice,* pages 363-364 ---- 36

In the Supreme Court of the United States

No. 7.
OCTOBER TERM, 1965.

THE HANNA MINING COMPANY, *et al.*,
Petitioners,
v.
DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

BRIEF FOR THE PETITIONERS.

THE OPINIONS BELOW.

The Opinion of the Circuit Court for Douglas County, Wisconsin, dated July 25, 1963 (R. 1-5) and the Order thereon, dated July 26, 1963 (R. 5, 6) have not been reported.

The Judgment (R. 65) affirming the Circuit Court and the Opinion of the Supreme Court of the State of Wisconsin dated April 13, 1964 (R. 66-76) and Order denying a rehearing dated June 30, 1964 (R. 77) are reported in 23 Wis. (2d) 433, 127 N. W. (2d) 393.

JURISDICTION.

The Judgment of the Supreme Court of Wisconsin was entered on April 13, 1964 (R. 65) and petitioners' motion for rehearing was denied on June 30, 1964 (R. 77).

The petition for a writ of certiorari was filed on September 23, 1964, and granted on March 15, 1965 (R. 77).

The jurisdiction of this Court is invoked under Title 28, U. S. C. A. § 1257.

QUESTIONS PRESENTED.

1. Whether or not the determinations of the General Counsel of the National Labor Relations Board affirming the dismissal of unfair labor practice charges filed under the Labor-Management Relations Act, as amended, Title 29, U. S. C. A. § 141, et seq., should be accorded final legal significance upon the question of jurisdiction by the Wisconsin court as "initial determinations" of the National Labor Relations Board within the meaning of this Court's decision in *San Diego Unions v. Garmon*, 359 U. S. 236.

2. Whether or not the State Courts of Wisconsin may exercise jurisdiction to enjoin respondent labor organization from conducting recognition and organizational picketing of petitioners' vessels and the marine engineers employed thereon in Superior, Wisconsin, which is illegal under Wisconsin law, after the following initial determinations were obtained by the petitioners from the National Labor Relations Board:

(a) A dismissal of a petition for a representation election by a Regional Director and affirmed by the National Labor Relations Board upon a finding that the petitioners' marine engineers are supervisors excluded from the coverage of the Labor-Management Relations Act, as amended, Title 29, U. S. C. A. § 141, et seq.;

(b) Rulings by the General Counsel of the National Labor Relations Board affirming a Regional Director that the supervisory status of the marine

engineers precludes any application of Section 8(b)(7) of the federal Act to limit and restrain recognition and organizational picketing; and

(c) A ruling by the General Counsel of the National Labor Relations Board affirming a Regional Director that there was no evidence of any secondary boycott activity prohibited by Section 8(b)(4) of the Act in the conduct of the picketing.

STATUTES INVOLVED.

The statutes involved are material parts of the Labor-Management Relations Act, as amended, 29 U. S. C. A. § 141, et seq., consisting of Section 2(3) (29 U. S. C. A. § 152(3)); Section 3(d) (29 U. S. C. A. § 153(d)); Section 7 (29 U. S. C. A. § 157); Section 8(b)(4) and Section 8(b)(7) (29 U. S. C. A. § 158(b)(4) and (7)); and Section 14(a) (29 U. S. C. A. § 164(a)). They are printed in the Appendix at pages 40-45, *infra*.

STATEMENT OF THE CASE.*

Petitioners are corporations which own and operate vessels on the Great Lakes transporting cargoes in interstate and foreign commerce. The Hanna Mining Company, one of the petitioners, acts as agent and operates all of these vessels as an integrated fleet (R. 46, 47).

Marine engineers licensed by the United States Coast Guard are employed on petitioners' vessels as ship's officers. As part of their duties, the engineers supervise the work of unlicensed seamen who are represented by the United Steelworkers of America, AFL-CIO, in a bargain-

---

* The facts are based on the verified complaint, as amended, and affidavits, which were dismissed on respondent's motion (R. 6-43, 46-53), supplemented by exhibits introduced by mutual consent of the parties (R. 53-64).

ing unit designated by the National Labor Relations Board (herein "NLRB") comprising the vessel crews of all four petitioners (R. 17-19, 47).

Respondent District 2, Marine Engineers Beneficial Association (herein "MEBA") is a labor organization with a membership of licensed marine engineers; the other respondents are its officers, agents and representatives. It has labor agreements in effect with certain other companies operating vessels on the Great Lakes which contain provisions requiring compulsory Union membership as a condition of employment (R. 19, 44, 47, 48).

Petitioners had a collective bargaining agreement with the MEBA covering the licensed marine engineers employed aboard petitioners' vessels which terminated on July 15, 1962; thereafter, negotiations commenced for a new contract (R. 20, 48).

In August 1962, while contract negotiations were in progress, a majority of petitioners' marine engineers notified the petitioners in writing that they did not want to be represented by the MEBA. Petitioners promptly notified the MEBA of this development and took the position that further negotiations must be suspended until the question of representation was resolved; that the MEBA should investigate the authenticity of the engineers' written petitions by consulting with the marine engineers aboard their vessels; and that if the MEBA's investigation failed to confirm the authenticity of the written petitions from the marine engineers, the controversy should be submitted to arbitration. If the authenticity of the engineers' petitions was not disputed, petitioners proposed a secret ballot election conducted by an impartial party to determine whether or not the MEBA represented a majority. If such an election demonstrated that the MEBA repre-

sented a majority, petitioners would then recognize the MEBA as collective bargaining representative and resume contract negotiations (R. 20-21, 48).

In August and September, 1962, MEBA representatives boarded petitioners' vessels and consulted with the marine engineers. Without raising any question regarding the authenticity of the marine engineers' petitions disavowing the MEBA as collective bargaining representative, MEBA demanded an immediate resumption of contract negotiations. Petitioners refused to recognize the MEBA unless its majority status was established by means of a proper election (R. 21-22, 49).

On September 12, 1962, the MEBA commenced picketing the S. S. Joseph H. Thompson, one of petitioners' vessels, at a dock in Duluth, Minnesota, where its cargo was being unloaded (R. 22, 49). The picket signs read (R. 22-23):

"Hanna Mining Unfair
to
Marine Engineers
Beneficial Association
Refuses to Negotiate
Contract
AFL-CIO
No Dispute With Any
Other Employer
S. S. Joseph Thompson"

Dock workers refused to unload coal cargo from petitioners' vessel because of the picketing. The work stoppage continued until September 28, 1962, when the Thompson left with the remainder of her coal cargo aboard (R. 23).

The MEBA also commenced picketing petitioners' vessels at other Great Lakes ports on and after Septem-

ber 12, 1962, including Superior, Wisconsin. The same picket signs were used with appropriate changes for the name of each vessel (R. 23, 41, 49).

The MEBA picketing continued until on or about December 1, 1962, when the Great Lakes navigation season ended and all ships were laid up, as customary, for the winter months and the vessel crews were laid off. As a consequence of the MEBA picket lines, petitioners' vessels had been refused tug service in many Great Lakes ports; some dock workers at Superior, Wisconsin had refused to load iron ore cargoes into such vessels; and coal dock workers in Duluth, Minnesota had refused to unload the coal cargo from the S. S. Joseph H. Thompson (R. 23, 41, 49, 51).

None of the licensed marine engineers, other licensed officers, or unlicensed seamen employed on petitioners' vessels participated in any of the MEBA picketing activities and all such personnel continued working steadily aboard petitioners' vessels until the close of the navigation season in 1962. There were no work stoppages of any kind among petitioners' vessel crews (R. 23, 42, 52).

On September 12, 1962, as soon as the MEBA picketing commenced, petitioners requested the Regional Director of the NLRB at Cleveland, Ohio, to conduct a representation election among the licensed marine engineers aboard petitioners' vessels to determine whether or not the MEBA represented a majority (R. 24, 50). Upon investigation, the Regional Director dismissed the petition by letter dated September 25, 1962 (R. 57, 58), for the stated reason that the marine engineers were "supervisors" excluded from the coverage of the National Labor Relations Act. Upon appeal, the NLRB in Washington affirmed the Regional Director's dismissal by letter dated November 20, 1962 (R. 29-30), upon a finding that a unit

composed of supervisors was inappropriate for collective bargaining since supervisors are excluded from the Act and therefore no question concerning representation existed over which the NLRB had jurisdiction.

On September 15, 1962, petitioners filed charges with the Regional Director of the NLRB in Minneapolis, Minnesota, that the MEBA had engaged in secondary boycott activity violating Section 8(b)(4) of the Act (R. 53-54). After investigation, the Regional Director dismissed the charges by letters dated October 16, 1962 (R. 59-60) and October 22, 1962 (R. 62-63), which stated that as a consequence of investigation and consideration, it was concluded that no violation of Section 8(b)(4) of the Act is indicated. Upon appeal, the General Counsel of the NLRB in Washington affirmed the dismissal of the charge by letter dated December 10, 1962 (R. 31-33), stating, in part:

> "Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity."

On September 27, 1962, petitioners filed charges (R. 54) with the Regional Director of the NLRB in Cleveland, Ohio, that the picketing of petitioners' vessels with the object of forcing or requiring plaintiffs to recognize or bargain with the MEBA as the representative of its engineers or forcing or requiring such engineers to accept the MEBA as their Union representative violated Section 8(b)(7) of the Act and that by these and other actions the MEBA violated the National Labor Relations Act. After investigation, Regional Director dismissed the charge by letter dated October 5, 1962 (R. 34-35).

Upon appeal, the General Counsel of the NLRB in Washington affirmed the dismissal by letter dated November 26, 1962 (R. 36-37), stating that there was insufficient evidence that the picketing was for an object proscribed by Section 8(b)(7) of the Act since the MEBA was seeking representation rights in a unit comprised solely of "supervisors" as distinguished from "employees" within the meaning of the Act. In response to petitioners' request for clarification, the General Counsel amplified on the basis for affirming the Regional Director's action in a letter dated December 21, 1962 (R. 37-38), stating, in part:

> "Our disposition of this case was predicated solely upon our conclusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act. Moreover, having reached a conclusion which in our view was dispositive of the charge in this matter, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of Section 2(3) of the Act. We might add that in processing the appeal in this manner, this office acted in accordance with its established practice."

In the latter part of April and May 1963, when the Great Lakes became navigable again, the petitioners' vessels were placed into operation (R. 15, 28, 41, 49). The MEBA resumed picketing at Superior, Wisconsin with signs identical to those used in 1962; there had been no picketing activity during the winter months while petitioners' vessels were laid up. Tugs refused to serve petitioners' vessels in Superior, Wisconsin, due to the picketing, causing delays during adverse weather and endangering the ships and their crews in the narrow channels

and confined waters of the harbors where navigation can be hazardous without tug assistance (R. 15-16, 28, 41, 51). Costly delays occurred to petitioners' vessels. The licensed engineers and other crew members ignored the picketing and continued working steadily aboard petitioners' vessels (R. 16, 23, 42, 52).

On June 24, 1963, petitioners filed a complaint in the Circuit Court for Douglas County, Wisconsin, seeking an injunction against the picketing at Superior (R. 6-13). The complaint and supporting affidavits alleged that the MEBA was picketing the petitioners' vessels at the ore loading docks of the Great Northern Railway Company in Superior with signs similar to those used in the 1962 picketing; that the objective of the picketing was the same as that of the earlier picketing, i.e., to compel petitioners to recognize MEBA and to compel its engineers to become members of that Union, even though those employers did not desire MEBA as their representative; that such objective was unlawful under Wisconsin law; that the Board had previously determined that the engineers were supervisors to whom the National Labor Relations Act did not apply; that the picketing was the cause of work stoppages among individuals of employers other than petitioners; and requesting an order enjoining the MEBA, *inter alia*, from picketing its vessels or the docks where they were located and from seeking to compel petitioners to employ only members of MEBA or to force its engineers to become and remain members of MEBA (R. 6-13, 14-43). On the following day, June 25, 1963, the Circuit Court granted a temporary restraining order against the picketing and issued an order to show cause why an injunction should not be granted (R. 13-14). Service was obtained on the MEBA and the other respondents, some of whom had to be served outside of the State of Wisconsin.

The MEBA appeared specially and moved for a dismissal of the complaint upon the grounds that the court lacked jurisdiction over the subject matter because the NLRB had exclusive jurisdiction thereof and the court had no jurisdiction over the persons of the defendants (R. 43-46). An amended complaint was filed by petitioners to clarify the pleadings (R. 46-53).

On July 25, 1963, the Circuit Court held in a Memorandum Opinion without any hearing on the merits that the Court lacked jurisdiction over the subject matter (R. 1-5). Thereafter, the Court entered an order on July 26, 1963, that the matter is within the jurisdiction of the NLRB and that the Court is without jurisdiction, dismissing the action, denying the restraining order and vacating the temporary restraining order (R. 5-6). The claim of the MEBA that the Circuit Court lacked jurisdiction over the persons of the defendants was not pressed.

Upon appeal, the Supreme Court of Wisconsin affirmed its Circuit Court on April 13, 1964 (R. 65-76) and denied petitioners' motion for a rehearing on June 30, 1964 (R. 77).

SUMMARY OF ARGUMENT.

The Supreme Court of Wisconsin erred by holding that the rulings of the General Counsel of the National Labor Relations Board with respect to unfair labor practice charges are not the "initial determinations" required to establish state court jurisdiction under the procedural requirements of this Court. The General Counsel of the Board has final statutory authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints involving unfair labor practices covered by the Act and he acts independently of any direction and control by the Board in such matters.

The General Counsel made a final jurisdictional determination in this case by ruling that the limitations and restraints of Section 8(b)(7) of the Act upon recognition and organizational picketing do not apply because, in a concurrent determination, the Board itself ruled that the engineers involved are "supervisors" excluded from the coverage of the Act. The exclusion of the personnel and the activity from the scope of the Act, rather than insufficient evidence of a violation, was thus determined. The General Counsel was acting within his statutory authority in so ruling, and his determination should be given final legal significance.

The conclusion of the General Counsel was that Section 8(b)(7) of the Act had no application to the recognition and organizational picketing by the MEBA due to the absence of "employees" among the personnel against whom the primary picketing of the MEBA was directed and that the primary picketing of the engineers who are "supervisors" for recognition and organizational objectives was not and never could be a violation of the federal Act. It seems obvious that Wisconsin was thereafter free to

assert jurisdiction and apply its state law which bans recognition and organizational picketing without encroaching upon federal jurisdiction or thwarting national labor policy.

The court below erroneously dismissed petitioners' amended complaint for relief from recognition and organizational picketing under state law despite the initial determinations by the Board and its General Counsel by holding that the picketing nevertheless remained within the exclusive jurisdiction of the Board. In so doing, the jurisdictional importance of the exclusion of supervisors from the coverage of the Act was ignored. The federal Act has no application, either protective or prohibitive, with respect to MEBA primary picketing of petitioners' vessels for recognition as a representative of supervisors and the laws of Wisconsin could therefore be applied to regulate such primary picketing.

The federal Act does not protect efforts to organize individuals employed as "supervisors" since Section 7, which protects the right to self-organization, is limited to "employees" and "supervisors" are explicitly removed from the category of "employees" under Section 2(3) of the Act. It was the purpose of Congress to relieve employers from any compulsion to accord the front line of management the anomalous status of employees. Congress also added Section 14(a) to the Act relieving employers of any duty to bargain collectively with supervisors or their representatives. Therefore, MEBA efforts by picketing or otherwise to compel recognition as collective bargaining agent for supervisors are not protected by the federal Act.

The evils of recognition and organizational picketing were recognized by Congress in 1959 when Section 8(b)(7) was enacted. The failure of Congress to restrain recog-

nition picketing directed at supervisors results from the general exclusion of supervisors from the coverage of the Act. The prohibition of recognition picketing by Wisconsin (and several other states) is consonant with federal labor policy; there is no repugnancy.

The states are free to regulate labor activities where doing so does not conflict with matters which have been pre-empted to the NLRB by the federal Act. To formulate a cohesive national labor policy, this Court requires the submission of "arguable issues" to the NLRB for "initial determinations" before a state court may assert jurisdiction. However, federal pre-emption is partial so that activity which is neither protected nor prohibited by the federal Act can be regulated by the states.

We submit that the state courts of Wisconsin had jurisdiction to regulate the MEBA primary picketing of petitioners' marine engineers and vessels for recognition after the Board ruled that these engineers were "supervisors" and its General Counsel ruled that Section 8(b)(7) of the Act did not apply due to absence of "employees" under the express wording of the statute. All of the essential jurisdictional issues had been resolved with unclouded legal significance, giving the Court below jurisdiction to apply state law. Otherwise, a paradox results in which primary picketing by the MEBA, although neither protected nor prohibited by the federal Act, and not designedly left free for the interplay of economic forces by Congress, nevertheless remains free of state restraint even though unlawful under state law. Such a "no-man's land" is not compelled by, nor does it advance, the avoidance of potential interference with the policies of the federal Act.

The jurisdiction of the state courts of Wisconsin over the primary recognition picketing of the supervisory marine engineers and petitioners' vessels by the MEBA at

docks was not affected by the possibility that such picketing may have "secondary" as well as "primary" aspects. Unlike ordinary common situs picketing in which all phases are regulated by the federal Act, the picketing in this case was a "hybrid." The primary recognition picketing was not covered by the federal Act and therefore subject to control by the state because "supervisors" are the objective. Any secondary boycott aspects directed at other employers on the docks which formed a common situs remained subject to Board regulation under Section 8(b)(4) of the federal Act. The two aspects are separable under the circumstances of this case because the federal Act does not extend to recognition picketing of supervisors. State court regulation of primary recognition picketing would not encroach upon Board jurisdiction over secondary activity in the same picketing because it involves no potential conflict with federal regulation.

An analogous situation is the primary picketing of foreign vessels which a state is empowered to enjoin because the federal Act does not apply to their crews.[1] Primary picketing of vessels, domestic or foreign, ordinarily occurs when they are docked. A common situs is involved where other employers and employees are engaged in their usual business activity, and potential secondary aspects are therefore present. Although the Board may have exclusive jurisdiction regarding the secondary aspects, this does not deprive state courts of jurisdiction to enjoin the primary picketing since there is no potential conflict between federal and state action.

The court below should have held a hearing on the merits and adduced evidence regarding the controversy including the scope of the rulings by the Board and its

---

[1] *Incres Steamship Co. v. International Maritime Workers Union*, 372 U. S. 24.

General Counsel because the petitioners' amended complaint sufficiently pleaded a violation of state law. Federal pre-emption over labor matters does not require state courts to deprive parties of hearings and determine facts by speculation. Any differences in the primary picketing due to the passage of time could only be determined from the evidence. Petitioners should have been accorded an opportunity to prove the geographical and substantive scope of the "initial determinations." Unfair labor practice charges merely initiate Board action. The investigation by the Board is not limited by the charge but includes all pertinent activity involved. Therefore, the picketing activity at Superior, Wisconsin, was investigated and considered by the Board and its General Counsel. Although petitioners were prepared to show that there were no changes in the conduct of MEBA picketing at Superior following the General Counsel's and Board determinations, the court below stated that subsequent picketing might have differed without adducing any proof.

The pleader is entitled to the benefit of every reasonable inference from well-pleaded facts whenever the sufficiency of a complaint is challenged. The court below ignored this rule. Petitioners' amended complaint for injunctive relief against recognition picketing illegal under Wisconsin law fully pleaded the initial determinations of the Board and its General Counsel to invoke state jurisdiction. It was error to summarily dismiss the action without a hearing on the merits.

The procedural requirements formulated by this Court to mold a cohesive national labor policy have been misapplied so as to protect primary recognition picketing which is illegal under both federal and state law. Such a result could not have been intended. This paradox results from the concept of the court below that state and federal

remedies over the same picketing activity are not separable, even though state regulation would be confined to the "primary aspects" and Board regulation is limited to "secondary aspects." No state relief can ever be obtained against recognition picketing directed against supervisors according to the court below so long as there is any possibility that the Board might eventually find a secondary boycott violation of the federal Act in the same picketing. As a practical matter, this renders it impossible to obtain state court relief, for such a possibility would always be "arguable" whenever a common work situs such as a dock is involved.

The court below erred in holding that it lacked jurisdiction to enjoin primary recognition and organizational picketing by the MEBA directed against marine engineers and their vessels after an initial determination by the General Counsel that such picketing is neither protected nor prohibited by the federal Act because of a Board ruling that the marine engineers are supervisors.

ARGUMENT.

I.

State Courts Should Accord Final Legal Significance to NLRB General Counsel Rulings on Unfair Labor Practice Charges Under the Labor-Management Relations Act.

The Supreme Court of Wisconsin erred by rejecting petitioners' contention that the rulings of the General Counsel of the NLRB upon unfair labor practice charges should be accorded final legal significance (R. 75-76):

> "Plaintiffs acknowledge the Garmon rule to the extent that a state agency or court has no jurisdiction over conduct arguably subject to NLRA until the NLRB has made a final determination that the conduct is not so subject. * * * They argue that the rulings of the General Counsel are determinations of the NLRB. Thus they assert that they have fulfilled the Garmon rule for avoidance of conflict between NLRB and courts and state agencies. Since, they would say, it has been finally determined that the conduct complained of is not an unfair labor practice, and presumably that such conduct is not protected by the Act because of the supervisory status of the people who are the object of the MEBA's effort, the state is now free to apply its own law. * * * plaintiff's logic seems clear, if they properly accord final legal significance to the acts of the General Counsel. But we do not read Garmon as permitting this result."

We submit that the Wisconsin Supreme Court should have given the rulings of the General Counsel of the NLRB acting within the scope of his statutory authority the same final legal significance as determinations of the NLRB itself with respect to unfair labor practice charges. This is clearly required by section 3(d) of the Labor-

Management Relations Act, as amended, 29 U. S. C. A. § 153(d), which provides, in part:

> "There shall be a General Counsel * * * appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * *He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title and in respect of the prosecution of such complaints before the Board,* and shall have such other duties as the Board may prescribe or may be provided by law." (Emphasis supplied.)

Any doubt concerning the General Counsel's authority is dispelled by the legislative history. In the Committee of Conference, House Report 510, June 3, 1947, on the Labor-Management Relations Act, 1947, U. S. Code Congressional Service, 80th Congress, First Session, 1947, on page 1143:

> "The General Counsel * * * is to have final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

The procedure of the Board is based upon the concept that the General Counsel's determinations are final.[1] Under the rules and regulations of the NLRB, 29 C. F. R., Part 102, § 102.19, the only review of a refusal by a Regional Director to issue a complaint upon an unfair labor practice charge is by the General Counsel. Consequently, he has the final authority to determine on behalf of the Board that the Act does not apply to a particular activity and there can never be a further determination by the

---

[1] Statements of Procedure of the NLRB, Series 8, as amended, 29 C. F. R., Part 101, § 101.6.

Board itself when the General Counsel declines to issue a complaint based upon lack of jurisdiction or any other reason.

It has been held by this Court,[1] and by federal courts,[2] that final action upon any unfair labor practice charge which is dismissed, for lack of jurisdiction, or other grounds, is taken by the General Counsel; such a charge never reaches the NLRB itself and the General Counsel's determination is final.

In *Hourihan v. National Labor Relations Board, et al.*, 201 F. 2d 187, on page 188:

> "Section 3(d) of the Labor-Management Relations Act provides that the General Counsel of the Board 'shall have final authority on behalf of the Board, with respect to the investigation of the charges and issuance of complaints under Section 10.' The Board cannot issue an order until the General Counsel issues a complaint. The Court has no power to order the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before the Board."

This Court denied certiorari in the *Hourihan* case, 345 U. S. 930, rehearing denied 345 U. S. 961, 346 U. S. 843, 346 U. S. 880 and 346 U. S. 917.

It is clear that the determinations of the General Counsel of the NLRB, acting within his statutory authority, should be given the same legal significance as determinations of the NLRB itself. However, the Wisconsin Supreme Court interpreted *Garmon*[3] as preventing this result because of the language on pages 245, 246 therein:

---

[1] *Lewis v. Labor Board*, 357 U. S. 10, 15-16.

[2] *NLRB v. Swift & Co.*, 233 F. 2d 226, 231.

[3] *San Diego Unions v. Garmon*, 359 U. S. 236.

"To require the states to yield to the primary jurisdiction of the National Board does not insure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the states are ousted of all jurisdiction, or the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the states. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by the refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance."

We submit that the refusal of the General Counsel to file a complaint does not always leave the status of the activity undetermined and thereby oust state courts of jurisdiction. In the special circumstances of this case, where the General Counsel has determined that the limitations and restraints of Section 8(b)(7) of the Act upon recognition and organizational picketing do not apply because the unit personnel are "supervisors" and not "employees" within the meaning of the Act under a concurrent finding of the NLRB, final jurisdictional determinations have been made.

II.

A. The Supreme Court of Wisconsin Erred in Holding That the Initial Determinations of the NLRB and Its General Counsel Were Insufficient to Invoke State Court Jurisdiction.

The Supreme Court of Wisconsin held that the principles laid down in *San Diego Unions v. Garmon*, 359 U. S. 236, and *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. 173, required the Wisconsin courts to decline to regulate recognition and organizational picketing of supervisors, illegal under Wisconsin law, despite all of the "initial determinations" obtained by the petitioners from the NLRB and its General Counsel upon issues arguably subject to NLRB jurisdiction and the Labor-Management Relations Act. It was the view of the court below that the controversy remained within the exclusive jurisdiction of the NLRB and this ousted the jurisdiction of the Wisconsin state courts. An anomalous situation manifestly resulted, as acknowledged by the Wisconsin Supreme Court in its Opinion (R. 76):

> "We recognize that in the circumstances of this case, the rule produces something of a paradox. MEBA's alleged organizational picketing is unlawful under Wisconsin law, and is probably not protected by federal law because of the supervisory status of the marine engineers. Such picketing cannot be prevented by NLRB procedure unless the NLRB General Counsel has probable cause to believe that MEBA's conduct is a secondary boycott. Yet since such picketing approaches being unlawful under federal law as a secondary boycott, Wisconsin must decline to enjoin it. On the record before us, we can perceive no escape consistent with the Garmon decision."

The NLRB had previously ruled, in effect, that since the engineers were supervisors there was no potential ap-

plication of the federal Act except upon the narrow ground of a possible violation of Section 8(b)(4) prohibiting secondary boycott activity. The state courts of Wisconsin declined jurisdiction because the picketing created a possibility of a secondary boycott violation over which the NLRB had exclusive jurisdiction. The end result is that recognition and organizational picketing of supervisors is left completely unregulated by any tribunal or agency, federal or state, and this result could not have been intended by Congress or by this Court.

The petitioners made every effort to obtain the "initial determinations" required by the *Garmon* and *Interlake* decisions, *supra*, before seeking state court relief in Wisconsin. The NLRB itself ruled that petitioners' marine engineers were supervisors (R. 29). The NLRB Minneapolis region ruled that no violation of Section 8(b)(4) of the Act "is indicated" on the part of the MEBA (R. 59-60, 62-63) and was affirmed by the NLRB General Counsel (R. 31-32) on the ground that there was insufficient evidence to establish that the MEBA had engaged in any unlawful secondary activity, and *that the picketing conformed to the standards prescribed for primary and common situs picketing* under *Moore Dry Dock*, 92 NLRB 547.

The NLRB Cleveland region dismissed petitioners' 8(b)(7) charge and the NLRB General Counsel affirmed stating there was insufficient evidence of proscribed picketing "particularly in view of the fact that the union was seeking representation rights in a union composed solely of supervisors as distinguished from employees within the meaning of the Act." (R. 36-37.) Upon request for clarification, the General Counsel stated (R. 37-38):

> "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the li-

censed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act. Moreover, having reached a conclusion which in our view was dispositive of the charge in this matter, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of Section 2(3) of the Act. We might add that in processing the appeal in this manner, this office acted in accordance with its established practice. Accordingly, we have no alternative but to deny your request for reconsideration and to consider this case closed."

The complaint filed to enjoin the recognition and organizational picketing by the MEBA in Superior, Wisconsin, with supporting affidavits, on June 24, 1963, requested an order enjoining MEBA, *inter alia*, from picketing petitioners' vessels or the docks where they were located and from seeking to compel petitioners to employ only members of the MEBA or to force its engineers to become and remains members of MEBA. The Circuit Court, on motion of MEBA, dismissed the complaint, as amended, for lack of jurisdiction over the subject matter (R. 1-6) and the Supreme Court of Wisconsin affirmed (R. 65-77).

The Supreme Court of Wisconsin noted that organizational and recognition picketing by the MEBA was unlawful in Wisconsin under the rule established by *Vogt, Inc. v. International Brotherhood*, 270 Wis. 315, 321b, affirmed 354 U. S. 284 (R. 70), reviewed the *Garmon* and *Interlake* cases, and stated (R. 74-75):

"If the activity does not constitute a secondary boycott, the reason would seem to be that the activity was no more than 'primary picketing,' and apparently the Regional Director and General Counsel were not convinced that the activity went beyond primary picket-

ing. It would seem to us, in contemplation of the Garmon rule as stated by the Supreme Court, that the drawing of the distinction between the secondary boycott and the primary picketing should surely be performed by the NLRB."

The Supreme Court of Wisconsin then concluded that MEBA's picketing, as described in the complaint and supporting affidavits, arguably violated Sections 8(b)(4) and 8(b)(7) of the Labor-Management Relations Act (R. 75) despite the previous rulings by the NLRB and its General Counsel and, therefore, under the decisions of this Court in *Garmon* and *Interlake*, state regulation was barred until the NLRB itself had conclusively determined these issues because rulings by the General Counsel were insufficient (R. 75-76).

The court below understands the decisions of this Court as requiring the NLRB to make comprehensive rulings particularizing the nature of the labor activity and jurisdictional issues before a state court can assert jurisdiction even though the record disclosed that the NLRB refused to provide any opinions to the petitioners in the nature of a declaratory judgment (R. 29-30).

We submit that petitioners' complaint, as amended, incorporating the previous determinations and rulings of the NLRB and its General Counsel, set forth a *prima facie* case of illegal organizational and recognition picketing under Wisconsin law over which the Wisconsin courts were empowered to assert jurisdiction; the dismissal of petitioners' complaint, as amended, was based upon a misunderstanding of the decisions of this Court.

In *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive com-

petence of the National Labor Relations Board if the danger of state interference with National policy is to be averted." And, in *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. 173, this Court specifically applied this principle to the picketing activities of MEBA. However, in *Interlake*, unlike this case, there had been no effort to present the underlying activity to the NLRB or its General Counsel, before instituting the state court action; the court below failed to perceive this important distinction.

The exclusion of supervisors from the Act gave special meaning to the General Counsel's rulings in this case.

A Board determination of whether activity is prohibited by the Labor-Management Relations Act is ordinarily obtained by filing a charge with the General Counsel. If the General Counsel finds reasonable cause to believe an unfair labor practice has been committed, he will issue a complaint (§ 10(b) and 3(d) of the Act, 29 U.S.C.A. 160(b) and 153(d)), and the matter is ultimately decided by the Board. If, on the other hand, the General Counsel finds that the evidence is insufficient to believe that an unfair labor practice has been committed, he declines to issue a complaint and the matter never reaches the Board. Thus, in the usual case, the General Counsel's refusal to issue a complaint does not "define the nature of the activity with unclouded legal significance" (*Garmon*, 359 U. S. 246), and the matter remains within the exclusive jurisdiction of the NLRB. However, the General Counsel made jurisdictional determinations by ruling that the Act did not apply to recognition picketing of the supervisory marine engineers in this case.

The Labor-Management Relations Act prohibits peaceful picketing when it is conducted for secondary boycott objectives by Section 8(b)(4), and limits primary

picketing conducted for recognition or organizational purposes by Section 8(b)(7). Otherwise, peaceful picketing falls either within the protection of Section 7 of the Act or within the area which Congress has purposely left to the free interplay of economic forces. When the General Counsel refuses to issue a complaint in the usual case on charges that picketing violated Section 8(b)(4) or Section 8(b)(7), such rulings would be insufficient to establish that the activity was not subject to the Act and within the exclusive jurisdiction of the NLRB; it would merely indicate that there was insufficient evidence that such picketing violated the Act and would raise the possibility that the picketing was affirmatively protected or purposely left free from any regulation. However, as previously pointed out, the General Counsel ruled that Section 8(b)(7) of the Act is not applicable to recognition picketing of the marine engineers and petitioners because the engineers are supervisors to whom the Act does not apply.

We submit that the Wisconsin courts erroneously considered this case in the same light as the ordinary case in which the applicability of the Act is evident but proof of a violation is lacking. The jurisdictional importance of the exclusion of supervisors from the coverage of the Act was not recognized. The court below failed to perceive that the determinations made by the NLRB and the General Counsel meant that the Labor-Management Relations Act has no application, either protective or prohibitive, with respect to the primary picketing by the MEBA of petitioners' vessels and that the Wisconsin courts were therefore empowered by these initial determinations to regulate the MEBA's primary picketing for recognition directed at the petitioners' vessels and the engineers employed thereon.

B. Recognition and Organizational Picketing of Supervisors Is Neither Protected Nor Prohibited by the Act and State Courts Are Free to Regulate Such Picketing.

The Labor-Management Relations Act does not protect efforts to organize individuals employed as "supervisors" rather than "employees." Section 7 of the Act, which protects the right to self-organization, is limited to "employees," and, in the 1947 amendments, Congress removed "supervisors" from the category of "employees" (Section 2(3) 29 U. S. C. A. § 152(3)). Its purpose was to "relieve employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411; *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. at 178, n. 5. The congressional will resulted in Section 14(a) of the Act which provides that, although supervisors are free to join unions, "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." Congress having legislated to free employers from federal, as well as state, compulsion to recognize and bargain with the union representing supervisors, efforts by a union to compel such recognition and bargaining are not protected by the Labor-Management Relations Act.[1]

The primary picketing by the MEBA to force petitioners to recognize it as the representative of the engi-

---

[1] *NLRB v. Budd Mfg. Co.*, 169 F. 2d 571 (CA-6), certiorari denied, 335 U. S. 908; *Alabama Marble Co.*, 83 NLRB 1047, 1049, 1074; *Modern Cleaners Co.*, 100 NLRB 37, 38-39; *Jackson Electric Membership Corp.*, 106 NLRB 1019; *Leonard Niederriter Co.*, 130 NLRB 113.

neers who are supervisory personnel, or forcing such engineers to accept the MEBA as their collective bargaining representative is not prohibited by the Labor-Management Relations Act, not even "arguably" so. Section 8(b)(7), the provision regulating picketing for organizational or recognition purposes, expressly applies only to picketing directed at "employees." [1]

There is nothing in the history or policies of the Labor-Management Relations Act which suggests or intimates that Congress, although neither protecting nor prohibiting organizational picketing directed at supervisors, intended such picketing to be beyond the reach of the states. In reporting upon the amendment which added Section 8(b)(7) to the Act (effective November 13, 1959), the Senate Report, U. S. Code Congressional and Administrative News, 1959, Volume 2, stated on page 2381:

> "Such picketing also has the purpose of coercing the employer into recognizing the Union and signing a contract with it, thus forcing the employees to join, even though the employees do not want the Union as their bargaining agent. The employer is thus coerced by the threat to his business to violate the law by coercing his employees into joining the Union. It would be difficult to imagine a technique more alien to the free choice with respect to unionization that the Taft-Hartley Act guaranteed to employees."

The evil of organizational picketing—i.e., that it coerces the persons involved to join and the employer to recognize the picketing union,[2] is precisely the same

---

[1] Section 8 (b) (7) became effective in 1959 after *Interlake, supra,* was decided by Minnesota and this amendment to the Act eliminates any conflict between Wisconsin and federal labor policy.

[2] Other states also ban recognition picketing: see *Interlake SS. Co. v. MEBA,* 108 N. W. 2d 627 (Minnesota); *Pappas v.*

(Continued on following page)

whether the picketing is directed at "supervisors" or "employees" within the meaning of the Act. Therefore, the failure of Congress to prohibit such picketing when directed at supervisors can only be explained by the exclusion of supervisors from the coverage of the Act, Section 2(3) and Section 14(a).

This Court has held that states are free to regulate labor activities where doing so does not conflict with matters which have been pre-empted to the NLRB by the federal Labor-Management Relations Act. In *Garner v. Teamsters Union*, 346 U. S. 485, on page 488:

> "The National Labor-Management Relations Act, as we have pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

In *Weber v. Anheuser Busch, Inc.*, 348 U. S. 468, on pages 480-481:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters Union, supra, but as the opinion

---

(Continued from preceding page)

Stacey, 151 Maine 36, appeal dismissed 350 U. S. 870; *Anderson et al., v. Local Union No. 698*, 101 Ohio Appeals 542, appeal dismissed 165 O. S. 512; *Building Service Employers Int. Union, Local 272 v. Gazzam*, 339 U. S. 532 (Washington).

in that case recalled, the Labor-Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S. at 488. This penumbral area can be rendered progressively clear only by the course of litigation."

This partial federal pre-emption in the regulation of labor activities is the only perceptible reason why it was considered necessary by this Court to require the submission of "arguable issues" to the NLRB for "initial determinations." [1] If federal pre-emption over labor activities were total, there would obviously be no necessity for drawing boundary lines between state and federal jurisdiction. Thus, it has been said, that union activity which is neither protected nor prohibited by the federal Act can be regulated by the states.

We submit that recognition and organizational picketing of supervisors is an area of labor activity which the states are free to regulate. In this case, the NLRB ruling that the petitioners' engineers were "supervisors" and the determination of the NLRB General Counsel that Section 8(b)(7) of the Act proscribing this type of picketing cannot be applied because the individuals against whom it is directed are "supervisors" and the presence of "employees" is required by the express wording of the statute, have determined all of the essential issues "with unclouded legal significance" (*Garmon*, 359 U. S. 246). Hence, the federal Act neither protects nor prohibits the MEBA from engaging in primary picketing of petitioners' vessels to compel recognition as the representative of its supervisory engineers. Therefore, we submit that Wisconsin courts are free to assert jurisdiction and regulate this picketing under state law.

---

[1] Professor Clyde W. Summer, Yale Law School, 54 Labor Relations Reporter 11 (1963).

The failure by the Wisconsin courts to give final legal significance to the determinations of the NLRB and its General Counsel leads to a result that the court below recognized as a "paradox," in which primary picketing by the MEBA, although neither "arguably" protected nor prohibited by the federal Act, and not designedly left free for the interplay of economic forces by Congress, nevertheless remains free of state restraint even though the picketing is unlawful under state law. Such a "no-man's land" is not compelled by, nor does it advance, the principles underlying the *Garmon* pre-emption doctrine which seeks the avoidance of potential interference with the policies of the Labor-Management Relations Act; the government of the United States concurs with our views.[1]

C. The State Court Was Not Deprived of Jurisdiction to Regulate MEBA's Primary Recognition and Organizational Picketing of Supervisors Because the Picketing May Also Have Secondary Objectives.

We submit that Wisconsin was not deprived of all jurisdiction to regulate the picketing of petitioners' vessels by the MEBA because such picketing might have "secondary" as well as "primary" aspects. Nevertheless, the Supreme Court of Wisconsin considered it to be of primary jurisdictional importance that the recognition and organizational picketing by the MEBA, which is unlawful under Wisconsin law, might also be or become unlawful under federal law as a secondary boycott and, for that reason, believed that state courts were compelled to decline to enjoin such picketing under the *Garmon* decision (R. 76). This conclusion must be incorrect. Otherwise, the whole

---

[1] See Memorandum for the United States filed by the Solicitor General and the National Labor Relations Board in this case.

field of potential relief is compressed into a possibility that the labor organization may eventually violate Section 8(b)(4) of the Act by engaging in secondary boycott activity which the NLRB will suppress and, in the meantime, no state limitations upon recognition and organizational picketing of supervisors can be applied. This creates total rather than partial federal pre-emption.

The picketing of petitioners' vessels at Superior occurred at a common situs where other employers, such as the dock and tug companies, were conducting their respective business operations. Under the criteria of the NLRB, set forth in *Moore Dry Dock*, 92 NLRB 547, 549, picketing at a common situs is secondary and unlawful within Section 8(b)(4)(B) if it is directed at the secondary employers and their employees, but such picketing is primary and outside the prohibition of that Section if every reasonable effort has been made to confine the picketing to the primary employer's operation. Since the picketing by the MEBA of petitioners' vessels did cause some work stoppages among employees of other employers on the common situs, the NLRB and its General Counsel were called upon to determine whether this was an incidental result of primary picketing directed at petitioners, or the result of secondary activity by the MEBA. The NLRB General Counsel concluded that the *Moore Dry Dock* criteria were being observed and the picketing was primary (R. 31-32). If the picketing were secondary, the NLRB could suppress it as a violation of Section 8(b)(4) of the Act even though the ultimate object was to secure recognition by the MEBA as the representative of supervisors, for the protection of this Section extends to "any person" engaged in commerce.

We submit that the primary picketing by the MEBA, since it seeks to obtain recognition as the representative of

supervisors who are excluded from the coverage of the Labor-Management Relations Act, is activity which the courts of Wisconsin could regulate after these initial determinations were obtained irrespective of any potential action by the General Counsel of the NLRB upon secondary aspects in the same picketing which the NLRB could proscribe under Section 8(b)(4) of the Act. This follows because unlike ordinary common situs picketing where both the secondary and primary aspects are regulated by the federal Act, the MEBA picketing in this case was a "hybrid." The primary picketing directed at petitioners was outside the coverage of the federal Act and therefore should be subject to control by the State of Wisconsin. Any secondary boycott aspects in the picketing, directed at employers other than petitioners on the common situs, was subject to regulation by the NLRB under Section 8(b)(4) of the federal Act. Consequently, the courts of Wisconsin under state law should be empowered to enjoin the MEBA's primary picketing as a violation of Wisconsin law because such relief cannot encroach upon the jurisdiction of the NLRB as to any secondary activity in the same picketing.

The basic consideration underlying federal pre-emption of labor matters is that states cannot be left free to control activities potentially subject to federal NLRB regulation because it would involve too great a danger of conflict with national labor policy (*Garmon, supra*). However, state regulation of recognition and organizational picketing of persons employed as supervisors excluded from the coverage of the federal Act involves no potential conflict with federal policy, for federal regulation in this field has been expressly excluded by Congress.

A parallel situation is the primary picketing of foreign vessels which a state is empowered to enjoin because the

federal Act does not apply to crew members on those ships.[1] Primary picketing of foreign vessels, as well as domestic ships, usually occurs in a common situs situation, as in the picketing here, and such picketing would have secondary aspects. Although the NLRB "arguably" has exclusive jurisdiction to proscribe any secondary aspects of picketing directed at foreign vessels, this does not deprive state courts of jurisdiction to enjoin the primary picketing because there is no potential conflict between federal and state action.

In our view of the controversy, it is immaterial whether or not any secondary activity was present in the picketing for recognition and organizational objectives in the spring of 1963 at Superior because regulation of the primary picketing was completely outside the jurisdiction of the NLRB as declared by the General Counsel after an NLRB finding that the engineers were "supervisors." Therefore, we submit that Wisconsin could regulate the primary picketing for recognition and organization of supervisors without regard to any possibility that it may be accompanied by secondary activity.

D. Petitioners Should Have Been Given the Opportunity to Prove the Scope of the NLRB Determinations. The State Court Erred by Denying a Hearing on the Merits and Speculating on the Facts.

Although the question was never definitively decided, both the Circuit Court (R. 4) and Supreme Court of Wisconsin (R. 75) commented that the picketing which the NLRB investigated in the fall of 1962 may be different from the picketing which petitioner sought to enjoin in the spring of 1963.

---

[1] *Incres Steamship Co. v. International Maritime Workers Union*, 372 U. S. 24.

Charges were filed and the facts pertaining to the picketing at Superior, Wisconsin, and elsewhere during the fall of 1962 were presented to the NLRB by the petitioners. Under NLRB procedure, the filing of a charge serves only as a request that the NLRB take action. Consequently, the NLRB investigation is not limited to the allegations contained in the charge but should include all pertinent facts. The NLRB may issue a complaint of violations of the Act which are developed by investigation and may include additional matters not mentioned in the charge, even those events which have occurred after the filing of the charge.[1]

In reliance upon the rule that a charge merely initiates NLRB action and need not encompass all of the activity involved,[2] petitioners furnished information to the NLRB Regional Director at Minneapolis regarding MEBA activities at Superior, Wisconsin, without filing separate charges regarding the activity there, and submitted affidavits from witnesses at Superior for NLRB consideration in the fall of 1962. The NLRB conducted an investigation of its own at Superior.

Petitioners interpreted the NLRB General Counsel's disposition of the 8(b)(4) charge on December 10, 1962 (R. 31-32), after the 1962 Great Lakes navigation season had ended, as encompassing MEBA picketing activity at Superior as well as other ports, from the context of the

---

[1] *National Licorice v. Labor Board*, 309 U. S. 350, 369; *Douds v. International Longshoremen's Association*, 147 F. Supp. 103, 108.

[2] See also *N. L. R. B. v. Kingston Cake Co.* (CA-3) (1951), 191 F. 2d 563; *N. L. R. B. v. Westex Boot & Shoe Co.* (CA-5) (1951), 190 F. 2d 12; *N. L. R. B. v. Pecheur Lozenge Co., Inc.* (CA-2) (1953), 209 F. 2d 393; *N. L. R. B. v Anchor Rome Mills, Inc.* (CA-5) (1956), 228 F. 2d 775; *N. L. R. B. v. Harris* (CA-5) (1953), 200 F. 2d 656.

ruling, inasmuch as the facts regarding such activity had been furnished.

Petitioners were unable to obtain a hearing upon the merits of the controversy, either in the Wisconsin courts or before the NLRB, and never had an opportunity to show the scope of the matters considered by the NLRB in Superior where the picketing before and after the NLRB General Counsel's determinations was identical; the same picket signs were used; many of the same pickets appeared; they stood in the same place; and they acted in the same way.

The perfunctory dismissal of the petitioners' amended complaint by the Wisconsin courts upon the assumption that any possibility of conduct violating the federal Act reposed exclusive jurisdiction in the NLRB even though some of the activity was admittedly outside NLRB jurisdiction, i.e., the primary organizational picketing of supervisors by the MEBA, was characterized as a "paradox" but required by *Garmon, supra.*

We submit that the Wisconsin court should have exercised jurisdiction and adduced evidence on the merits. *Garmon* and *Interlake, supra,* do not require state courts to determine facts by speculation.

E. Petitioners Were Entitled to the Benefit of Every Reasonable Inference and the State Court Erred by Summarily Dismissing the Complaint.

In Wisconsin, when the sufficiency of a complaint is challenged, the pleader should be given the benefit of every reasonable inference from well-pleaded facts. 2 *Wisconsin Pleading and Practice,* pages 363-364. This Court followed the same rule in *Retail Clerks et al. v. Schermerhorn,* 373 U. S. 746, 753-754.

The facts in the instant case closely parallel those in *Marine Engineers Beneficial Association v. Interlake SS Co.*, 370 U. S. 173, in which the MEBA picketed Great Lakes vessels in Duluth, Minnesota. Interlake filed a complaint in a Minnesota court charging violations of Minnesota law without first filing with the NLRB for "initial determinations." The Minnesota court held that the engineers were "supervisors" excluded from the federal Act, that the MEBA was not a "labor organization" within the meaning of the federal Act since "supervisors" were involved, denied MEBA's motion to dismiss and enjoined the picketing. This Court reversed Minnesota because of this failure to submit "arguable issues" for initial NLRB determinations.

In compliance with *Interlake, supra,* petitioners presented all issues to the NLRB and obtained "initial determinations." Petitioners' complaint for injunctive relief against recognition and organizational picketing illegal under Wisconsin law was based on these NLRB initial determinations and therefore set forth a cause of action which should not have been perfunctorily dismissed.

F. The Procedural Requirements Created to Ensure a Cohesive National Labor Policy Are Being Used to Protect Picketing Which Is Illegal Under Both Federal and State Law. This Should Be Corrected.

Petitioners, and other litigants similarly situated, are cast into a dilemma. No relief can be obtained, according to the Supreme Court of Wisconsin, against recognition and organizational picketing by a labor organization if the personnel involved are supervisors excluded from the coverage of the Labor-Management Relations Act, so long as there is any possibility that the NLRB might find a violation of Section 8(b)(4) of the federal Act prohibiting

secondary boycott activity in the picketing. This would make it impossible as a practical matter to obtain state court relief, for such a possibility will always be "arguable."

The Wisconsin Supreme Court regarded petitioners' efforts to obtain "initial determinations" from the NLRB to mean that the marine engineers involved, though ruled as supervisors by the NLRB, "arguably" continue to be "employees" (R. 75). This could not have been intended by *Garmon* and *Interlake, supra.* The procedure to be followed in resolving arguable issues to pave the way for state court jurisdiction should be clarified.

The procedural rules for molding a cohesive national labor policy have been misinterpreted and twisted into an obstacle to state court jurisdiction. This could not have been intended. Wisconsin views these procedural requirements as protecting recognition and organizational picketing that is illegal under both state and federal law. This Court should not permit such a "paradox" to continue.

CONCLUSION.

For the foregoing reasons, we believe that the Supreme Court of Wisconsin erred in holding that the state court lacked jurisdiction to enjoin primary recognition and organizational picketing by the MEBA directed against petitioners' vessels and the marine engineers employed thereon after the NLRB determined that such picketing is neither protected nor prohibited by the Labor-Management Relations Act because the marine engineers directly involved are supervisors.

Respectfully submitted,

LUCIAN Y. RAY,
1550 Union Commerce Building,
Cleveland, Ohio 44115
Counsel for Petitioners.

JOHN H. HANNINEN,
McCREARY, HINSLEA & RAY,
1550 Union Commerce Building,
Cleveland, Ohio 44115,

PAUL L. WITKIN,
JOHNSON, FRITSCHLER, WITKIN & JOHNSON, LTD.,
304-308 Telegram Building,
Superior, Wisconsin 54881,
Of Counsel.

APPENDIX.

STATUTES INVOLVED.

Relevant provisions of the Labor-Management Relations Act:

29 U. S. C. A. § 152 (Section 2).

"Definitions

"When used in this subchapter—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

29 U. S. C. A. § 153 (Section 3).

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the

regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the Senate in which such nomination was submitted.

29 U. S. C. A. § 157 (Section 7)

"Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U. S. C. A. § 158 (Section 8).

"Unfair labor practices

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

"Provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:

* * * * *

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representa-

tive of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) Where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title.

"(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

"(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, that when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, that nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection."

29 U. S. C. A. § 164 (Section 14).

"Supervisors as union members; recognition by employers

"(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

29 C. F. R., Part 102, NLRB Rules and Regulations, Section 102.19.

Review by the general counsel of refusal to issue.—If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D. C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and the reasons upon which the request is based.